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EBA FINAL draft Regulatory Technical Standards

on the minimum monetary amount of the professional indemnity insurance or comparable guarantee for mortgage credit intermediaries under Article 29(2)(a) of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property

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Abbreviations

BSG	Banking Stakeholder Group
EBA	European Banking Authority
EU	European Union
MCD	Directive 2014/17/EU on credit agreements for consumers relating to immovable residential property (Mortgage Credit Directive)
NSAs	National supervisory authorities
PII	Professional indemnity insurance
RTS	Regulatory Technical Standard

1. Executive summary

Article 29(2)(a) of Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to immovable residential property (Mortgage Credit Directive, MCD) gives a mandate to the EBA to develop draft regulatory technical standards (RTS) to stipulate the minimum monetary amount of the PII or comparable guarantee, to submit them to the Commission by 21 September 2014, and to review them for the first time by 21 March 2018, and every two years thereafter.

To fulfil its mandate, the EBA sought to collate evidence and identify the most suitable, robust and representative way in which the minimum monetary amount could be calculated. The EBA carried out desk research, surveyed competent authorities in the 28 EU Member States to identify current national regulatory approaches to PII, and received feedback from more than 40 insurance industry practitioners in 14 Member States to elicit further views.

Having assessed these inputs in the policy development phase prior to consultation, four options emerged as to how best to calculate the minimum amount. These options were assessed against the following criteria: the feasibility of obtaining the data required to implement the option; the methodological robustness; the degree of consumer protection that will be achieved with the minimum amount that the option will bring about; the compliance costs for mortgage credit intermediaries and the impact on national regulators; and the proportionality of the resultant minimum amount.

The four options were presented in the consultation between December 2013 and March 2014, with option 4 (setting the minimum amount at the average of the amounts used in those Member States that already require PII for mortgage credit intermediaries) identified as the preferred choice. Seven responses were received, all of which have been published on the EBA website. Two additional responses were received after the deadline and therefore cannot be published.

The EBA's dismissal of option 2 (pegging the minimum amount of the MCD PII to that set for insurance intermediaries in Directive 2002/92/EC on insurance mediation) has been widely supported by respondents. None of the responses provided evidence that would lead the EBA to reconsider its preference for option 4. Four respondents were of the view that option 4 is the most reasonable, while three respondents preferred option 3 (setting the minimum amount to the lowest level in place in Member States) but did not provide a conclusive rationale as to why this should be the case.

Several respondents suggested ways to improve the calculation of the minimum amount. However, given the current absence of the data required to implement those suggestions, the EBA will defer considering them until 2018, when it will review the RTS and by which time it may have additional data available. The EBA accepted suggestions to change and correct the figures for two countries that were used in the calculation formula in option 4. This has resulted in final



minimum amounts of EUR 460 000 per claim and EUR 750 000 per year, which represent the EBA's final draft RTS.

2. Background and rationale

Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to immovable residential property (Mortgage Credit Directive, MCD) was published in the Official Journal of the European Union on 28 February 2014.¹ The MCD aims to address a series of issues identified by the European Commission, including the lack of requirements pertaining to the professionalism, registration and authorisation of mortgage credit intermediaries. The Commission identified several concerns, including the fact that national supervisory authorities (NSAs) may have little scope for supervision and/or may be unable to impose sanctions. It was felt that this could potentially result in an uncompetitive environment in which professionals who are guilty of misconduct, take excessive risks or provide poor advice may not be held to account. Furthermore, it was found that mortgage credit intermediaries' clients did not always have the right to redress in the event of a dispute.

These concerns were felt to be compounded when cross-border business was taken into consideration. Although cross-border activity is limited at present, a survey conducted by Europe Economics for the Commission's impact assessment showed that its significance is expected to increase as a distribution channel over the next five years, further underlining the need for greater harmonisation of requirements.²

The MCD seeks to address these concerns by stipulating that mortgage credit intermediaries will be subject to numerous requirements, including an admission process by the competent authority of their home Member State and subject to ongoing supervision. Intermediaries are to meet strict professional requirements in relation to their competence, which are to apply at least at the level of the institution.³ One of the requirements is set out in Article 29 of the MCD, which requires Member States to ensure that mortgage credit intermediaries hold professional indemnity insurance (PII) covering the territories in which they offer services, or some other comparable guarantee against liability arising from professional negligence.

PII is liability insurance aimed at covering, either entirely or in part, sums to be paid by professionals to third parties as compensation for losses arising from acts committed by the professional during the conduct of its business activities. Where such a requirement exists in national jurisdictions, the eligibility of compensation claims for the purpose of PII cover tends to be limited to those made by customers of the professionals, while those made by business partners tend to be excluded (although this may differ in individual cases). In Article 29(2)(a) of

¹ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:060:0034:0085:EN:PDF>

² See footnote 57 in European Commission (2011), *Commission Staff Working Paper Impact Assessment – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property*, p. 16, at http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_356-ia_en.pdf.

³ As opposed to the level of individual employees. See Recital 69 of the MCD.

the MCD, the EBA is mandated to develop draft regulatory technical standards (RTS) to stipulate the minimum monetary amount of the PII or comparable guarantee, to submit them to the Commission by 21 September 2014, and to review them for the first time by 21 March 2018, and every two years thereafter.

The mortgage credit intermediaries to whom the PII requirement will apply are defined in Article 4(5) of the MCD as:

‘a natural or legal person who is not acting as a creditor or notary and not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary, and who, in the course of his trade, business or profession, for remuneration, which may take a pecuniary form or any other agreed form of financial consideration:

a) presents or offers credit agreements to consumers;

b) assists consumers by undertaking preparatory work or other pre-contractual administration in respect of credit agreements other than referred to in a point (a); or

c) concludes credit agreements with consumers on behalf of the creditor.’

Article 29(2)(a) of the MCD provides that the PII requirements apply in principle to all mortgage credit intermediaries. However, for tied mortgage credit intermediaries, the home Member State may provide that this insurance or comparable guarantee can be provided by a creditor for which the mortgage credit intermediary is empowered to act.

These draft RTS set the minimum monetary amount of the PII or comparable guarantee as the average of the amounts used in those Member States that already require PII for mortgage credit intermediaries. This is the result of a policy development that assessed four alternative approaches (described in the ‘impact assessment’ section), the fourth of which was the approach proposed by the EBA for consultation as the most appropriate. This involved calculating the minimum monetary amount for the PII or comparable guarantee on the basis of the arithmetic average of the existing national minimum amounts of the PII or comparable guarantees. The four options were assessed against the following criteria:

- feasibility of obtaining the relevant data, calculating the threshold and implementing it across the 28 Member States;
- methodological robustness of the approach used to calculate the minimum monetary amount of the PII or comparable guarantees;
- degree of consumer protection that will be achieved by a given calculation approach and resultant minimum monetary amount of the PII or comparable guarantees;

- compliance costs for mortgage credit intermediaries that will be incurred as a result of the additional insurance they will have to take out, such as insurance premiums;
- compliance costs incurred by NCAs as a result of having to apply and enforce the minimum monetary amount in their jurisdictions; and
- proportionality of the approach, which should reflect different characteristics and indemnity risks, both among mortgage credit intermediaries and between mortgage credit intermediation activities and other, similar activities carried out by other populations of professionals, such as insurance intermediation, with a view to ensuring that the burdens imposed on addressees do not exceed what is necessary to achieve the objectives pursued.

Following the end of the consultation and after reviewing the responses received, the EBA has confirmed that the approach that it had proposed for consultation remains the preferred choice. However, on the basis of the feedback received and the correction of two factual mistakes in the amounts that had been used in the formula, the EBA has now updated the minimum amounts per year and per claim by lowering them by 15% and 19% respectively, compared to the amounts originally consulted on.

3. EBA FINAL draft Regulatory Technical Standards on the minimum monetary amount of the professional indemnity insurance or comparable guarantee for mortgage credit intermediaries under Article 29(2)(a) of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property

COMMISSION DELEGATED REGULATION (EU) No .../..**of XXX****[...]****supplementing Directive 2014/17/EU of the European Parliament and of the Council with regard to regulatory technical standards for professional indemnity insurance or comparable guarantee for credit intermediaries**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directive 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010⁴, and in particular the second subparagraph of Article 29(2)(a) thereof,

Whereas:

- (1) Article 29(2)(a) of Directive 2014/17/EU requires credit intermediaries to hold a professional indemnity insurance ('PII') or comparable guarantee covering the territories in which they offer services or some other comparable guarantee against liability arising from professional negligence.
- (2) While the requirement for mortgage intermediaries to hold PII or comparable guarantee is a novel regulatory requirement at the Union level, it is not so for all national jurisdictions in the Union. Indeed, those jurisdictions with experience in PII requirements exhibit the highest shares of intermediated mortgage sales across the Union, a history of significant market penetration by mortgage intermediaries and, as a result of the above, also follow a more refined approach to regulating this sector. Hence rules on the minimum amount of PII or comparable guarantee should be based on the experience of those jurisdictions when it comes to determining the most suitable approach for calculating that minimum amount.
- (3) In fact, such an approach would be appropriate for the Union as a whole, including for jurisdictions with smaller mortgage markets. This is because claims against mortgage intermediaries are *not* correlated to the underlying mortgage credit amount, which may vary widely across the Union, but are based primarily on maladministration, mis-selling, or excessive charges or interest rates, the resultant detriment of which vary much less.
- (4) By virtue of the third subparagraph of Article 29(2)(a) of Directive 2014/17/EU, a review of the rules on professional indemnity insurance for mortgage intermediaries is required at regular intervals. Thus, other options or methodologies

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OJ L 60/34, 28.2.2014, p. 34.

for determining the most appropriate level of professional indemnity insurance for mortgage intermediaries might become possible to be used for future revisions of these rules, especially as further historical data become available and supervisory experience with the functioning of the professional indemnity insurance is increased.

- (5) Article 29(2)(a) of Directive 2014/17/EU simply requires the establishment of a minimum amount of the professional indemnity insurance or comparable guarantees, without any further specification. It would be useful, nevertheless, to further specify the details of the application of that minimum amount in terms of claims and in terms of time in the interests of legal certainty and to ensure a more harmonised approach in the Union. In this respect it should be noted that many mortgage credit intermediaries in the Union carry out also insurance intermediation activities, for which, by virtue of Directive 2002/92/EC, a per-year-and-per-claim minimum amount of PII or comparable guarantee applies. As a result of that, most intermediaries carrying out both types of intermediation, and their insurers, are familiar with such an approach. Further, the majority of the Union Member States whose national laws require professional indemnity insurance by mortgage intermediaries also employ such an approach. For these reasons rules on PII for mortgage intermediaries should also propose such a per-year-and-per-claim distinction.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.
- (7) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010,

HAS ADOPTED THIS REGULATION:

Article 1

The minimum monetary amount of the professional indemnity insurance or comparable guarantee required to be held by credit intermediaries as referred to in the first subparagraph of Article 29(2)(a) of Directive 2014/17/EU shall be:

- (a) EUR 460 000 for each individual claim;
- (b) in aggregate EUR 750 000 per calendar year for all claims.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

4. Accompanying documents

4.1 Cost-benefit analysis/impact assessment

Article 15(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council) provides that when any draft regulatory technical standards developed by the EBA are submitted to the Commission for adoption, they should be accompanied by an analysis of ‘the potential related costs and benefits’. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

4.1.1 Problem definition and objective of the RTS

The European Commission has identified issues relating to non-existing professional requirements for mortgage credit intermediaries, including misconduct, excessive risk-taking or poor advice by mortgage credit intermediaries. In response, and in the light of its expectation of increased cross-border intermediation, the EU Commission included in Directive 2014/17/EU (MCD) provisions aimed at improving the competence and reputation of mortgage credit intermediaries. These include the requirement for intermediaries to take out professional indemnity insurance (PII) or a comparable guarantee. The EBA has been mandated to develop draft regulatory technical standards (RTS) to set the minimum monetary amount of the PII or some other comparable guarantee.

4.1.2 Baseline current regulatory framework and market practices

To inform the impact assessment for these proposed RTS, the EBA gathered information from NSAs on existing PII requirements across the EU Member States. The EBA received detailed responses from 22 of the 28 NSAs approached. Of these NSAs, six reported that PII is already a mandatory requirement for mortgage credit intermediaries, while 16 had no such requirement. As can be seen in Table 1 below, the requirements in the six countries differ significantly in terms of their coverage levels and thresholds to determine variations in the coverage levels.

Table 1: PII coverage levels for mortgage credit intermediaries in six EU Member States

Country	Per claim	Per year	Other type of requirements and comments
Italy	<ul style="list-style-type: none"> – if annual turnover (Y) in the year before the contract is \leq EUR 100 k, then the minimum amount per claim (MAC) is EUR 0.5 m – if Y is $>$ EUR 100 k \leftarrow EUR 500 k, then MAC is EUR 0.75 m – if Y is \Rightarrow EUR 500 k, then MAC is EUR 1.25 m 	<ul style="list-style-type: none"> – if annual turnover (Y) in the year before the contract is \leq EUR 100 k, then the minimum amount per year (MAY) is EUR 1 m – if Y is $>$ EUR 100 k \leftarrow EUR 500 k, then MAY is EUR 1.25 m – if Y is \Rightarrow EUR 500 k, then MAY is EUR 1.75 m 	
Austria	EUR 1 111 675	EUR 1 677 513	<ul style="list-style-type: none"> – Minimum levels defined in Austrian Trade Regulation Act (Article 136a, paragraph 12); do not apply to comparable guarantees – The minimum levels were adopted on 15 January 2013, and will be reviewed/aligned with price index every 5 years
France	EUR 500 000	EUR 800 000	
Slovakia	Not less than EUR 100 000	Not less than EUR 150 000	<ul style="list-style-type: none"> – Where co-insurance is agreed, it may amount to no more than 1% of the agreed claim payment
UK			<ul style="list-style-type: none"> – The higher of 10% of annual income up to GBP 1 million and GBP 100 000 for a single claim or GBP 500 000 in the aggregate – Firms should also hold a prescribed amount of additional capital resources if policy excess exceeds: <ul style="list-style-type: none"> – GBP 2 500 and 1.5% of annual income if firm does not hold client assets; – GBP 5 000 and 3% of annual income where it does – A firm does not require PII if it has net tangible assets of more than GBP 1 million or it has a comparable guarantee
Spain			<ul style="list-style-type: none"> – For the first year, EUR 300 000 multiplied by the number of business premises of the intermediary – For any other year, the higher of the following two values: <ul style="list-style-type: none"> – the preceding year's minimum coverage multiplied by the annual inflation rate (Consumer Price Index); – 30% of the preceding year's turnover stemming from the two activities that fall within the scope of the aforementioned regulations

A similar picture emerges with regard to the PII coverage level. National practices also vary in terms of comparable guarantees: They exist in only six EU Member States and the factors affecting the levels and the structure of the guarantee differ significantly, as set out in Table 2 below. The intermediaries subject to the requirements in the six Member States where PII is already mandatory for mortgage credit intermediaries account for approximately 73% of the total intermediary population in the EU.

Table 2: Comparable PII guarantees for mortgage credit intermediaries in six Member States

Country	Comments
France	If a credit intermediary receives funds from the public, it has to subscribe, in addition to PII, to a financial guarantee that at least covers EUR 115 000, or at least twice the average of the funds collected
Italy	Currently only a few Italian insurance brokers distribute PII contracts. They are produced by UK-based insurance companies
Spain	As a prerequisite for initiating their business, credit intermediaries shall hold PII or an equivalent bank guarantee, without further specification, against liability arising from their professional activity
Belgium	There are (i) guarantees; (ii) the obligation of the intermediary to deposit the premium paid by the customer to the (credit) financial institution which liberates the customer from its obligations (customer pays only once); and (iii) the obligation of the (credit) financial institution to reimburse the customer if the intermediary has not put the money on the client's account (the financial institution risks paying twice)
UK	A credit intermediary is allowed to use a comparable guarantee as an alternative to PII. Such a guarantee should be from another authorised person with net tangible assets of more than GBP 1 million, and if the firm is a member of a group with an authorised person with such net tangible assets, the comparable guarantee must be from that person. A comparable guarantee means a written agreement on terms at least equal to those in a contract of professional indemnity insurance to finance the claims that might arise as a result of a breach by the firm of its duties under the regulatory system or civil law
Norway (EEA Member State)	The regulation for independent credit intermediaries (FOR 1990-09-14 #764) requires all intermediaries to have a minimum guarantee for their activities of NOK 25 million. The coverage can be given as a credit guarantee, as an insurance guarantee or as a deposit in a credit institution or deposit of securities

4.1.3 Assessment of the impact of the options considered

Approximately 73% of the mortgage credit intermediaries in the EU are already subject to PII requirements or comparable guarantees. It is likely that the majority of the remaining 27% also carry out insurance intermediation activities and are therefore subject to the minimum amounts provided in the IMD. For the vast majority of the addressees of these RTS, PII coverage or comparable guarantees are therefore not a new requirement that would require major organisational changes for intermediaries or NSAs.

Some of these six Member States may need to make upward adjustments to reach the minimum amounts prescribed in these RTS, and 22 Member States, with a very low penetration of mortgage intermediaries, will need to introduce a new requirement. To the extent that mortgage intermediaries also carry out insurance intermediation activities, the additional requirement will result in firms needing to take out additional coverage through PII or a comparable guarantee to cover the additional activity of mortgage intermediation.

The premiums that insurance undertakings will charge, and the resultant costs that will be incurred, are difficult to anticipate given the lack of data available for mortgage intermediaries on historic claims, premium levels and the correlation between them. This is likely to result in relatively high premiums charged by insurance undertakings in the initial years, until they can avail themselves of such data.

The effect is compounded further by the current lack of competition amongst insurance undertakings. The responses from the 40 industry practitioners the EBA approached suggested

that competition will increase. All respondents indicated that the number of firms would increase, sometimes significantly so, once the PII coverage or comparable guarantee became a requirement. However, it is reasonable to assume that it will take a year or two before this increased competition has any effect on premiums, and that premiums will initially be high.

Irrespective of the estimated development of insurance premiums and costs incurred over time, the detailed impact in terms of additional costs incurred by intermediaries will vary significantly depending on the level at which the minimum amounts are to be set. To fulfil its mandate, the EBA sought to collate evidence and identify the most suitable, robust and representative way in which the minimum monetary amount could be calculated. The EBA carried out desk research, surveyed competent authorities in the 28 EU Member States to identify current national regulatory approaches to PII and received feedback from more than 40 insurance industry practitioners in 14 Member States to elicit further views. Having assessed these inputs, four options emerged for how best to implement the mandate, each of which would result in different levels of compliance costs for intermediaries:

- 1) Modelling the impact of different minimum monetary amount in terms of benefits to consumers and costs to intermediaries and identifying an amount that represents an appropriate trade-off between these conflicting considerations.
- 2) Pegging the minimum amount to that set for insurance intermediaries in the IMD, which would result in a minimum amount of EUR 1 250 618 per claim and EUR 1 875 927 per year.
- 3) Setting the minimum amount at the lowest amount used in those Member States that already require PII for mortgage credit intermediaries, which would result in a minimum amount of EUR 100 000 per claim and EUR 150 000 per year.
- 4) Setting the minimum amount at the average of the amounts used in those Member States that already require PII for mortgage credit intermediaries, which would result in a minimum amount of EUR 460 000 per claim and EUR 750 000 per year.⁵

Each of these options was assessed against the following criteria:

- feasibility of obtaining the relevant data, calculating the threshold and implementing it across the 28 Member States;
- methodological robustness of the approach used to calculate the minimum amount;
- degree of consumer protection that will be achieved by a given calculation approach and resultant minimum amount;

⁵ The corresponding amounts that had been consulted upon were EUR 584 000 per claim and EUR 886 000 per year but were changed following consultation to the amounts stated on this page.

- compliance costs that will be incurred by mortgage credit intermediaries as a result of the additional insurance they will have to take out, such as insurance premiums;
- compliance costs that will be incurred by NCAs as a result of having to apply and enforce the minimum monetary amount in their jurisdictions; and
- proportionality of the approach, which should reflect different characteristics and indemnity risks, both between mortgage credit intermediaries, and between mortgage credit intermediation activities and other, similar activities carried out by populations of professionals, such as insurance intermediation, with a view to ensuring that the burdens imposed on an addressee do not exceed what is necessary to achieve the objectives pursued.

When assessed against these criteria, none of the four options emerges as an uncontested favourite. Option 1 would result in a very robust methodological approach, which could then be fine-tuned to arrive at minimum amount(s) that would achieve a greater proportionality between different types of mortgage credit intermediaries. The degree of consumer protection achieved, as well as the premium costs incurred by intermediaries, would depend on the exact level at which the minimum amount(s) were set, and therefore cannot be assessed at this stage.

However, other compliance costs for intermediaries, as well as compliance costs incurred by NCAs, would probably be high, as gathering these data would require data collection to be carried out by the EBA via the NCAs collecting information from insurance intermediaries and, possibly, insurance undertakings. The criterion against which this option would be least successful is that of feasibility. The data sought above are not readily available across all 28 Member States. As a result, the EBA does not consider option 1 to be feasible.

Option 2, in turn, would score well with regard to feasibility, as no additional reporting data or modelling would be required. The degree of consumer protection achieved would be very high. Costs for NCAs would be minimal, as no additional information-gathering exercises would need to be carried out. Compliance costs for intermediaries would be low in terms of administrative burden, owing to the absence of additional reporting compliance. However, compliance costs would be high in terms of additional premium costs because, if the assumptions set out above are correct, mortgage credit intermediaries would be required to take out coverage levels that do not reflect the lower risk of claims to which they are exposed, with concomitant (but not necessarily proportional) increases in the insurance premiums. For the same reason, the proportionality criterion would not be met, as the burden imposed on intermediaries compared with other populations of similar professionals appears disproportionate.

Most importantly, the robustness criterion would not be met. The minimum PII amount for mortgage credit intermediaries would be pegged to a minimum level for another industry, which itself was calculated on the basis of a methodology that is not necessarily robust. Furthermore, the methodology of the minimum PII amount is itself under periodic review and may therefore

change over time, in ways that may not be appropriate for mortgage credit intermediation. As a result, the EBA does not consider option 2 to be desirable.

Option 3 would achieve a relatively high degree of feasibility, and an adequate but also low degree of methodological robustness. It is adequate because nothing better is available at this early inception stage, but it is also low, owing to the limited degree of representativeness of the country on which this amount is based. The degree of consumer protection achieved is lower than that achieved in options 2, 4 and probably also 1. Compliance costs for intermediaries would be low, as premium costs would be low and no additional reporting requirements would arise.

Costs for NCAs would also be low, and they would be no different to those incurred in options 2 and 4. The option would also be more proportionate than option 2 with regard to the comparative risk of exposure of mortgage credit compared with insurance intermediaries. Arguably, however, the resultant level is disproportionately low, although it is not possible to support this statement with data. As a result, the EBA does not consider option 3 to be desirable.

Option 4 would achieve a high degree of feasibility (akin to that of option 3), and a degree of methodological robustness that is slightly higher than that of option 3, as the sample of countries includes jurisdictions (such as France and the UK) that have the highest shares of intermediated mortgage sales across the 28 Member States in the EU; a history of significant market penetration by mortgage intermediaries and, therefore, more developed approaches to regulating this sector. It is therefore methodologically not unreasonable to look towards these countries, even if they are few in number, for guidance on the most suitable regulatory approach to be taken. The degree of consumer protection achieved is higher than in option 3 but lower than in option 2 (EUR 1.2 million and EUR 1.68 million respectively), and thus coincides with the hypothesis set out in option 2 that relatively speaking mortgage credit intermediaries pose a lower risk. It is the second highest of the four options considered (subject to the assessment carried out for option 1).

Compliance costs for intermediaries would be lower than option 2 but higher than option 3. Costs for NCAs would be similar to those in options 2 and 3. However, as in options 2 and 3, the level would not be proportionate to the different degrees of risk between different mortgage credit intermediaries.

Of the four options presented in the consultation paper, the EBA considers that option 4 achieves the best trade-off between various conflicting objectives and is therefore the preferred choice.

4.2 EBA feedback on the consultation responses

The public consultation period lasted for three months and ended on 18 March 2014. Seven responses were received, all of which were published on the EBA website. Two additional responses were received after the deadline and therefore cannot be published.

This paper presents a summary of the key points and other comments made during the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases, several industry bodies made similar comments or the same body repeated their responses across the various questions asked. In such cases, the responses, and the EBA feedback to these responses, are stated in the section of the paper where EBA considers them most appropriate.

Responses received during the consultation period have not provided evidence that would lead the EBA to reconsider its preference for option 4 as stated in the consultation paper. Four respondents were of the view that option 4 (setting the minimum amount at the average of the amounts used in Member States) is the most reasonable; three respondents would prefer to set a very low minimum level (option 3), on the basis of their view that this option better addresses national differences in EU Member States.

The EBA view expressed in the consultation paper that the activity of mortgage credit intermediaries gives rise to a lower risk of compensation claims compared to insurance intermediaries, and that option 2 (pegging the minimum amount of the MCD PII to that set for insurance intermediaries in Directive 2002/92/EC on insurance mediation) should therefore be dismissed, has been widely supported by respondents.

Several respondents suggested ways to improve the calculation of the minimum amount. However, in the absence of the data required to implement those suggestions, the EBA will defer consideration thereof until 2018, when it will review the minimum amount in accordance with Article 29(2)(a) of the MCD and by which time additional data should be available.

The EBA has accepted two proposals for changes relating to the level of the PII coverage. In the Consultation Paper, the level had not been correctly calculated owing to the failure to convert the currency of one of the countries used, and owing to the inclusion of one country that had, on closer examination, no such PII requirement in place. This has resulted in final minimum amounts of EUR 460 000 per claim and EUR 750 000 per year, which are lower than those proposed in the Consultation Paper (EUR 584 000 per claim and EUR 886 000 per year).

Table 3: Overview of responses to the consultation and the EBA's feedback

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
Responses to questions in Consultation Paper EBA/CP/2013/46			
<p>Question 1.</p> <p>Do you agree that, of the four options presented, option 4 (i.e. setting the minimum amount at the average of the amounts used in Member States) is the option the EBA should pursue, resulting in a minimum amount of EUR 584 000 per claim, and EUR 886 000 per year?</p>	<p>Three respondents agreed that option 4 appears to be the most feasible and reasonable option, although not all of them fully supported this option. One respondent suggested setting a level only for the aggregate amount per year as claims are extremely rare or, if a level is set both per claim and per year, lowering the level per claim to EUR 292 000. Another respondent would prefer to express the minimum annual level as the minimum level by claim multiplied by a factor of 1.5.</p> <p>Three respondents were of the view that option 3 (setting the minimum amount at the lowest amount used in those Member States that already require PII for mortgage credit intermediaries, which would result in a minimum amount of EUR 100 000 per claim and EUR 150 000 per year) is the most suitable option as it affords minimum amounts appropriate for some smaller/Eastern European countries. Two of these respondents proposed setting the level of the PII at the lowest minimum level and also allowing flexibility for Member States to establish higher levels if required owing to their national circumstances, because if PII cover is not available, the market cannot function. One respondent would prefer different levels to be established for particularly low-risk sectors.</p> <p>One respondent did not indicate its preferred option, but provided three examples of different</p>	<p>As the EBA acknowledged in its Consultation Paper, the rationale behind option 4 is not methodologically very robust. However, when evaluated against available data from 28 EU Member States and taking into account the level of consumer protection, it remains the preferable option.</p> <p>Respondents did not provide any additional data that would support their suggested amendments to the levels envisaged by option 4.</p> <p>The multiplication factor of 1.5 suggested by one respondent was not accepted by the EBA because the respondent did not provide any evidence in support of this amendment.</p> <p>The comments received on option 3 did not provide any evidence that would persuade the EBA to reconsider the preferred option stated in the Consultation Paper. Many comments had also already been elaborated upon in the Consultation Paper, such as the potential risk of limited competition amongst insurance undertakings offering PII cover.</p> <p>Regarding the comments identifying numerical errors in the calculation of the minimum amounts on the basis of the EBA's suggested methodology, the necessary changes have now been incorporated and the minimum amounts corrected.</p>	<p>Amendment of the levels of minimum amounts to EUR 460 000 per claim and EUR 750 000 per year.</p>

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	<p>scenarios related to an injury caused by mortgage credit intermediaries. However, these examples did not provide specific levels, except one, where the level of the PII as set by option 4 was deemed sufficient.</p> <p>The EBA's BSG and one respondent suggested that, even on the basis of the EBA's proposed methodology, the minimum amounts were not correctly calculated, owing to the failure to convert the currency of one of the countries used in the methodology, and owing to the inclusion of one country that had, on closer examination, no such PII requirement in place.</p>		
<p>Question 2.</p> <p>Do you consider the number and the compensable loss of compensation claims arising from the activity of mortgage intermediation to be lower than, the same as, or higher than those arising from insurance intermediation? Please explain your reasoning.</p>	<p>The majority of respondents considered the number of claims arising from mortgage credit business to be significantly lower than the number of claims arising from insurance intermediation. One respondent provided supporting data for one country showing 0 complaints originating from the mortgage market compared to 46% of the total number of complaints in the insurance market in 2012.</p> <p>Some respondents stated that the risk of liability of mortgage credit intermediaries is significantly lower than that of insurance intermediaries and also deemed the risk of a total loss for the consumer to be rather low.</p> <p>Other respondents stated that they were unable to respond to this question owing to a lack of data.</p>	<p>The EBA notes that respondents generally support the EBA's decision to discard option 2 (pegging the minimum amount of the MCD PII to that set for insurance intermediaries in Directive 2002/92/EC on insurance mediation), which would have resulted in a minimum amount of EUR 1 250 618 per claim and EUR 1 875 927 per year) presented in the Consultation Paper. The EBA therefore remains of the view that option 2 is not a desirable option for the draft RTS.</p>	<p>No amendments.</p>

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
<p>Question 3.</p> <p>Do you know of options other than those listed in this consultation paper that the EBA should consider when deciding on the minimum amount of coverage?</p>	<p>Respondents provided various examples of potential options, including factors to be considered by the EBA on how to calculate the minimum amount, such as: assurability; capacity and willingness of the insurers to insure; policy wording; the price of coverage; new liability considered by the law; cross-border coverage; deductibles; and alternatives to insurance.</p> <p>One respondent suggested EUR 250 000 per claim to take account of the fact that, for risks that are much more exposed and subject to compulsory insurance, significantly lower minimum insurance applies.</p> <p>Two respondents were of the view that option 3 presented in the Consultation Paper (setting the minimum amount at the lowest amount used in those Member States that already require PII for mortgage credit intermediaries, which would result in a minimum amount of EUR 100 000 per claim and EUR 150 000 per year) is the most suitable option.</p> <p>One respondent stated that the level of the PII should be a very low minimum amount and that the level should be set at the average of the amounts used in Member States (i.e. option 4.)</p> <p>Another respondent suggested that the risk of moral hazard should be considered, whereby consumers may be incentivised to lodge claims because the insurance cover exists, and that the EBA has not specified what is to be considered as a</p>	<p>The EBA acknowledges various potential factors that might be considered as an improvement when determining the minimum amount. However, at this stage, owing to the lack of required data at the EU level, these factors cannot be taken into consideration. Subject to availability of the required data in the future, the EBA will consider these comments when conducting its first review of the minimum PII coverage in 2018.</p> <p>The EBA is not convinced of the arguments presented in favour of option 3 because respondents have not provided data in support of their preference and the resultant degree of consumer protection would be very low.</p> <p>The EBA does not concur with the view that the requirement to set a minimum level implies that the very minimum currently used among Member States should be used. Taken to the extreme, this methodological approach would suggest that the EBA should have chosen the level most prevalent in the 21 Member States, namely a minimum level of zero. Furthermore, it would (and in the future will) be possible for the EBA to set a minimum level that is calculated without any reference to existing national requirements at all.</p> <p>The EBA accepts the comment relating to the risk of moral hazard, but considers this to be a general low-probability risk related to most types of insurance.</p> <p>Finally, it should be noted that the legal mandate given to the EBA relates to the determination of the minimum amounts of PII or comparable guarantee,</p>	<p>No amendments.</p>

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
<p>Question 4.</p> <p>Do you consider threshold(s) that distinguish between more than one minimum amount of PII coverage to be a desirable feature? If so, please explain how such threshold should be devised.</p>	<p>'comparable guarantee'.</p> <p>Several respondents stated that it would be preferable to distinguish between more than one minimum amount of PII coverage. However, they did not all provide details of the type of threshold with which such differentiation could be achieved. Amongst those respondents that did provide these details, the suggestions included calibrating the coverage depending on: the commission earned; the number of cases handled; turnover; whether the intermediary cashes funds on behalf of insurance companies; or whether or not the intermediary provides advice.</p> <p>Other respondents stated that this kind of differentiation would not be practical and would increase the effort and costs for the policy holder and regulatory authorities, as the data used for the threshold fluctuate over time and would have to be updated on a frequent/yearly basis.</p>	<p>but it does not relate to the definition of comparable guarantee.</p> <p>The EBA has considered the divergent views expressed and concludes that while calibration and multiple coverage levels would achieve greater proportionality, the downsides of setting up the relevant data exercises for mortgage credit intermediaries in the EU, and for their regulators, in order to achieve such a differentiation, could be too onerous. The EBA therefore concludes that no such differentiation should be made. However, the EBA sees potential merit in the suggestion made about binary 'yes/no' indicators, such as 'does/does not provide advice', as these indicators are likely to change less frequently over time and may therefore impose a lower burden on intermediaries and regulatory authorities. An analysis of the correlation between frequency/amount of PII claims and such indicators would be required. Subject to availability of the required data, the EBA will carry out such an analysis when conducting its review of the minimum PII coverage in 2018.</p>	<p>No amendments.</p>

4.3 Opinion of the EBA Banking Stakeholder Group

At the time of developing the Consultation Paper on draft RTS on the minimum monetary amount of the PII or comparable guarantee for mortgage credit intermediaries, the 2½-year term of the EBA's Banking Stakeholder Group (BSG) came to its scheduled end and a call for candidates for its second term had just been issued. As a result of the appointment in autumn 2013 of the second cohort of the BSG, and given the short timelines for the development of the draft RTS imposed by the MCD, it was not possible for the views of the BSG to be formally sought before the consultation was launched.

However, the BSG provided its feedback in response to the publication of the Consultation Paper. The feedback is summarised below and followed by the EBA's feedback on these comments.

4.3.1 Summary of BSG opinion

As a general comment, the BSG considers that the subject of professional indemnity insurance should be the responsibility not of the EBA, but rather of EIOPA. The BSG believes that close cooperation between the EBA and EIOPA in the setting of standards regarding PII is necessary. The BSG also believes that the current mandate does not appropriately reflect the complexity of the task, and that the mandate should have been broader to ensure an all-encompassing degree of protection provided to customers. The mandate should also deal with qualitative elements of PII such as the level of excess/deductible, the issue of exclusions, whether PII claims made by customers should be admitted in cases where a mortgage intermediary is bankrupted or otherwise goes out of business, what the minimum time period should be for such claims made by customers, and how a comparable guarantee should be defined.

To address its concerns, the BSG suggested two alternatives to be considered when developing these RTS. In alternative 1, the BSG accepts that option 4 as suggested in the Consultation Paper is the most suitable option, given the lack of historical claims data (which were available in only one of the six Member States and are insufficiently representative); ii) the lack of the concrete level of the insurance premiums paid by mortgage credit intermediaries; and iii) the diversity of approaches across the jurisdictions.

However, the BSG does not consider it methodologically robust to use a simple average of the responses received and would propose a weighted average approach, based on the findings presented by the European Commission in the Study on Credit Intermediaries in the Internal Market (2009), which show differences between the six mentioned Member States in terms of the number of intermediaries, number of employees and the volume of mortgage credit. If the figures used in the calculation were weighted by such factors, the BSG arrives at minimum amounts of EUR 343 000 per claim (instead of EUR 584 000) and EUR 778 000 per year (instead of EUR 886 000).

The BSG also prefers such levels to apply only to 'small mortgage credit intermediaries'. All other mortgage credit intermediaries should be required to have the same minimum amount per claim,

but a minimum amount per year that is double that of small mortgage credit intermediaries — EUR 1 556 000. The BSG considers this proposal to be balanced, considering an acceptable degree of consumer protection and also possible compliance costs for mortgage credit intermediaries.

The BSG also pointed out that when calculating levels in option 4 in the Consultation Paper, Italy was not taken into account in calculating the average amount per claim, and the data for the UK were used without converting them into euros.

As a second alternative, the BSG suggested devising a simple formula to determine appropriate levels of PII coverage for individual mortgage intermediaries active in particular markets in the European Union, instead of setting a single number of PII coverage. Changes in the market and other developments should also be taken into account, potentially leading to annual recalculations for individual mortgage intermediaries. The BSG suggests that the formula be composed of three basic elements: 1) a basic level of PII coverage (reflecting the relevant market the intermediary is active in); plus 2) certain add-ons (representing ‘specific’ risks in respect of an individual intermediary); minus 3) certain deductions (representing ‘specific’ risk mitigation factors in respect of individual intermediaries). The advantage of using this formula, so the BSG argues, is that it enables a proportionate accommodation to respective market and conditions of individual credit intermediaries while at the same time providing an appropriate level of consumer protection in that market. The data necessary for the calculations are of a type that tend to be the subject of regular reporting by intermediaries in other sectors of the financial market that are already regulated (such as investment and insurance intermediaries in a number of Member States).

4.3.2 EBA feedback on the BSG opinion

The EBA welcomes the opinion of the BSG. With regard to the mandate to draft these RTS, the EBA acknowledges the BSG’s concern but is of the view that consumer protection issues arising from the sale of banking products such as mortgages are fully within the remit of the EBA and that the EBA has therefore been correctly mandated to draft these RTS. The EBA also liaised with EIOPA during the policy development process so as to benefit from its insight.

The EBA accepts the BSG’s view that a suitable degree of consumer protection would require setting more than the minimum amount of PII cover and should also extend to defining a comparable guarantee, specifying excess and deductibles, and more. However, when setting binding technical standards, the EBA is limited to the specific mandate given to the EBA in the underlying Directive, and this mandate is limited to that specified in Article 29 of the MCD.

With regard to the calculation errors identified by the BSG for option 4, the EBA has taken this feedback on board and corrected the errors. On the basis of the input from the BSG and another input received, the EBA has amended the draft RTS and arrived at revised, and rounded, levels of EUR 460 000 per claim and EUR 750 000 per year, which represents the final RTS (instead of EUR 584 000 per claim and EUR 886 000 per year as proposed in the Consultation Paper).

The EBA does not find convincing the BSG's suggestion that the calculation formula in option 4 should weight the PII amount of each of the six Member States on the basis of the number of mortgage intermediaries in the respective Member State. This would be a suitable approach if the EBA were to set a minimum amount aimed at protecting as many consumers in Europe as possible *in aggregate*. However, the EBA also focused on finding a level that sufficiently respected the requirements that already exist in, and are deemed adequate by, *each Member State*. This consideration implies that even the requirement of Member States with a small intermediary sector must not be unduly 'overridden' by an excessive weight given to countries with considerably larger intermediary sectors and their (potentially different) requirements.

The EBA is not entirely convinced by the factors suggested by the BSG to calibrate the minimum amount, such as applying add-ons to individual intermediaries that represent 'specific' risks in and deductions for specific risk mitigation factors. While very appealing conceptually, the EBA considers the resultant costs of recurring data-collection exercises for both intermediaries and for regulators and insurers to outweigh the potential benefits. Furthermore, the EBA sees scope for insurers to request such data on an individual basis when pricing the insurance cover for the intermediary (at the coverage level set through these RTS). However, when reviewing the minimum level in 2018, the EBA will reconsider the suggestions made by the BSG using the more comprehensive data available at that point in time.